

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON

BRIAN GLAUSER, individually and on)
behalf of a class of similarly)
situated individuals,)

Plaintiffs,)

v.)

TWILIO, INC., a Delaware)
Corporation; and GROUPME, INC.,)
a Delaware corporation.)

Defendants.)

NO. 4:11-cv-02584-PJH

Oakland, California
Wednesday
September 3, 2014
9:00 A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

EDELSON PC
350 North LaSalle Street
Suite 1300
Chicago, Illinois 98101

BY: BENJAMIN H. RICHMAN, ESQ.

For Defendant GroupMe:

WHITE & CASE LLP
633 West Fifth Street
Suite 1900
Los Angeles, California 90071-2007

BY: BRYAN A. MERRYMAN, ESQ.

Reported By: Kelly Lee Polvi, CA CSR No. 6389, RMR, FCRR

1 **SEPTEMBER 3, 2014**

9:02 A.M.

2
3 **P R O C E E D I N G S**

4 **THE CLERK:** Calling cv case No. 11-2584, Glauser versus
5 Twilio, et al.

6 Appearances?

7 **MR. RICHMAN:** Good morning, Your Honor, Ben Richman on
8 behalf of the plaintiff.

9 **THE COURT:** Good morning.

10 **MR. MERRYMAN:** Good morning, Your Honor, Bryan Merryman
11 from White & Case on behalf of defendant GroupMe.

12 **THE COURT:** All right. Good morning.

13 All right, I've read the papers. Did you want to say
14 anything else this morning?

15 **MR. RICHMAN:** No, Your Honor, unless Your Honor has
16 questions, which we're obviously happy to answer.

17 **THE COURT:** Well, I guess my only question is why you
18 didn't take further steps with regard to the discovery sought
19 from Twilio, which is now a third party, since that defendant
20 has been dismissed, why you didn't take steps such as meeting
21 and conferring, filing a motion to compel, et cetera, and now
22 the time for opposing the motion has passed.

23 **MR. RICHMAN:** Sure. Certainly, Your Honor.

24 So with respect to the meet and confer process, frankly,
25 we originally considered whether we would just oppose the

1 motion with respect to the ATDS issue without additional
2 information. That was based on the fact that in another case,
3 which I believe GroupMe and Twilio brought up, that we're
4 prosecuting in the Northern District of Illinois, *Sterk v.*
5 *Redbox*, we had had summary judgment denied on the ATDS issue
6 where Twilio was the API provider and they had similarly not
7 provided any information in response to a subpoena.

8 That said, as the time moved on and we got closer to
9 responding, it was pretty clear that the defendant in that case
10 was going to seek leave to appeal, which has now been granted,
11 and that's moving up to the Seventh Circuit.

12 We thought it's better to come before Your Honor, put the
13 issue before Your Honor, see whether we could get the
14 additional information. If we can get it, then great, we'll be
15 able to present that to Your Honor rather than find out later
16 we should have had that information and used it in our
17 Opposition.

18 But I'll say, Your Honor, to begin with, the idea that we
19 haven't been diligent in pursuing that information at all just
20 doesn't ring true on our end. The whole purpose of dismissing
21 Twilio was to get the information from them.

22 I think the emails are clear, our discussions were clear
23 with them that we would be getting the information in exchange
24 for the dismissal.

25 Now, it was just as surprising to me as anybody else

1 that --

2 **THE COURT:** That's not entirely clear, what information
3 you were going to be getting in exchange for the dismissal,
4 given that there was some dispute and there were objections
5 with regards to that list of 10 items.

6 **MR. RICHMAN:** Sure. Well, Your Honor, I'm happy to speak
7 more about those conversations; I attempted to lay it out
8 clearly in my Declaration.

9 But the way the conversation went, was I first sent the
10 list of 10 items, counsel -- then-counsel for Twilio reviewed
11 that, we had a telephone conference as amongst the attorneys.
12 The way the conversation went was, "We're not sure we have all
13 of this information but we will go back to the client, we'll
14 figure out what is available, and we'll let you know if there's
15 any issues."

16 Certainly --

17 **THE COURT:** Did you believe that you needed this
18 information to oppose the Motion for Summary Judgment which was
19 filed on April the 28th?

20 **MR. RICHMAN:** Yes.

21 **THE COURT:** I mean, there's this delay of two months.
22 There's 60 days, essentially, between the filing of the Motion
23 by GroupMe and your service of the Subpoena on Twilio on the
24 day before the deadline.

25 **MR. RICHMAN:** Right.

1 **THE COURT:** The discovery cutoff date.

2 **MR. RICHMAN:** Certainly. And --

3 **THE COURT:** Didn't you realize before the day before that
4 you weren't getting the information that you believed you were
5 entitled to?

6 **MR. RICHMAN:** Right. So I guess, Your Honor -- I'm sorry
7 to talk over you. What I would say to that is when we have an
8 agreement in place through counsel for information to be
9 exchanged, I've never once had this issue arise.

10 We've certainly done -- had other cases in this district
11 and elsewhere where there's formal settlement agreements where,
12 in exchange for release, information is exchanged. Certainly
13 there's dismissals in exchange for information. That happens.

14 This information is valuable to this case, to our
15 client's claims, and to the class's claims.

16 So when we have an agreement like that in place, it's
17 confirmed by email, we have counsel's representations that
18 they're working on getting the information, you know, it's
19 difficult for me to assume that they're not going to follow
20 through on that.

21 Now, I guess we could have checked in earlier with them,
22 but --

23 **THE COURT:** At some point you made that decision because
24 you issued a subpoena, rather than relying upon representations
25 of counsel.

1 **MR. RICHMAN:** Right. And when that occurred was when I
2 personally checked in with now former counsel for Twilio. I
3 was told that we should speak directly to corporate counsel.
4 So I emailed corporate counsel that day, they asked for the
5 specific 10 requests.

6 That was my first red flag, was why are they now asking
7 for these requests if they've been working on this for several
8 months?

9 The next day I get an email back saying, "We never agreed
10 to give you any of this information; all we agreed to do was
11 respond in good faith to formal discovery requests."

12 Now, that's completely contrary to the agreement we had
13 in place, and it also doesn't make much sense because they
14 would be required to respond in good faith to formal discovery
15 requests no matter what. So why we would have agreed to that
16 in exchange for a dismissal doesn't make a whole lot of sense.

17 **THE COURT:** Where do you stand now? You've issued the
18 Subpoena and you've received objections; correct?

19 **MR. RICHMAN:** Exactly.

20 **THE COURT:** Have the objections been resolved? Have you
21 met and conferred over them?

22 **MR. RICHMAN:** We have not. And I think now it's -- as I
23 said, Your Honor, we considered whether we should just oppose
24 the motion and move forward. And in light of *Sterk* and the
25 ruling we had then -- now that's up on appeal -- we thought

1 that was likely at the time.

2 And as I think has been made clear by Twilio and GroupMe
3 in the papers, they have no interest in producing any of this,
4 this information.

5 I understand that the error is that we've been less than
6 diligent in this case, but that couldn't be further from the
7 truth, Your Honor. I think it's clear that they ran out the
8 clock on us -- purposely, it looks like, required us to serve a
9 formal Subpoena, which we did, and then said, "You know what?
10 We're not going to respond to that anyway, so thanks for
11 trying."

12 And as far as diligence otherwise, we've gotten new
13 discovery from GroupMe. We filed our motion for class
14 certification -- albeit two days late, but -- because I had the
15 second death in two months in my family and counsel was kind
16 enough to give us a short extension for that and the Court
17 granted it.

18 But otherwise, we're moving forward with this case,
19 Judge. It's not like we've been sitting on our hands, we're
20 not interested in pushing it forward. It's not fully briefed,
21 but we've briefed the motion for class certification.

22 **THE COURT:** Why is the information that you're seeking
23 from Twilio necessary for you to oppose this motion?

24 **MR. RICHMAN:** Certainly. So information like the types
25 of servers and software that Twilio was using, for example, if

1 we just had the make and model of the servers that were used
2 where GroupMe passed the text messages and phone numbers to be
3 dialed along to Twilio, what service those hit and then were
4 sent on to the wireless carriers, it would tell us what
5 capabilities those systems had, for example, which could speak
6 to whether they would fall under the definition of an ATDS.

7 I guess ultimately the question is whether the Court
8 thinks any of this information is relevant to responding to
9 that, but we certainly do --

10 **THE COURT:** Well, no motion to compel has been presented
11 to me, so I have yet to form an opinion as to whether or not
12 what you're seeking is necessary or not. And in your papers
13 you didn't really do a terribly good job of explaining why each
14 of the items that you're seeking is necessary for you to oppose
15 the motion.

16 I understand the big picture, that you don't believe
17 you've gotten the discovery from Twilio, which is now a third
18 party. I understand that. But you have not done what is
19 necessary to obtain the individual items -- as yet -- without
20 any meet and confer or motion to compel.

21 I don't know exactly where you stand today with regard to
22 that request or what it is exactly you're asking from the
23 Court. Some open-ended extension, so that you can do what --
24 what would be your next step, if I were to grant your request?

25 **MR. RICHMAN:** Certainly. My next step, Your Honor, I

1 would recommend that the parties meet and confer, either after
2 the hearing, later -- or tomorrow, Friday, in the next couple
3 of days, determine what information is available, and setting
4 aside this idea that the subpoena was untimely, despite that
5 the clock was run out on us, figure out what information is
6 available and decide how quickly Twilio can produce it or if
7 they're going to produce it at all. And then I would say that
8 within two weeks of getting that information we'd have a formal
9 Opposition on file, Your Honor.

10 I'm not looking for a ton of time, but I'm looking for
11 the information that Twilio agreed to provide us and then
12 suddenly changed its mind about at the 11th hour.

13 **THE COURT:** Okay.

14 You have a response?

15 **MR. MERRYMAN:** Yes, Your Honor.

16 First of all, Your Honor, the Court's first question was
17 why no meet and confer, why no motion to compel. It's exactly
18 the right question the Court should be asking because in
19 *Cartronix* the failure to move to compel was, by itself, a lack
20 of diligence in pursuit of a 56(d) motion.

21 And plaintiff recognizes that. That's why, in their
22 56(d) motion, on page 3 and footnote 2, the plaintiff said: In
23 conjunction with the instant motion, Glauser intends to serve a
24 written request for Twilio and Bandwith [sic] to supplement
25 their subpoena responses no later than Tuesday, August 5. In

1 the event they refuse, Glauser intends to file a motion seeking
2 an order compelling them to do so no later than August 12.

3 That's almost a month ago and there has been no contact,
4 no effort, nothing whatsoever.

5 So here we are in September in a situation where the
6 Court staggered briefing on the motion for summary judgment on
7 the auto dialer issue so that we could brief that in full prior
8 to filing the motion for class certification, and the Court, if
9 it chose, would set a hearing date and hear it first.

10 And so there is substantial prejudice to the defendant if
11 the plaintiff is allowed to delay that through his own lack of
12 diligence.

13 Here, given recent rulings around the country on the auto
14 dialer issue, this case is ripe for an auto dialer summary
15 judgment motion.

16 The other issue that the Court asked about is also
17 directly on point because the Court's right, the Declaration
18 submitted by Mr. Richman in support of the motion is very vague
19 in what it is they are looking for, what they -- and it can't
20 be what they hope to find; they have to give some evidence to
21 the Court that what they're looking for exists and then how
22 they would get it.

23 In paragraphs 14 on in the Richmond Declaration, which is
24 Document 112-1, Mr. Richman simply says that the subpoenas
25 bear directly on whether the hardware and software utilized to

1 send the text messages at issue constitutes an ATDS -- or auto
2 dialer, and then says, in paragraph 15: By way of example,
3 information related to Twilio's and Bandwidth's source code
4 would establish whether their systems reacted to an automated
5 process, et cetera.

6 That's not the kind of specific facts that the moving
7 party needs to come forward with on a Rule 56(d) motion in
8 order to have it granted. And, in fact, if the Court looks at
9 the Hazzard Declaration -- Mike Hazzard is the attorney that's
10 been referred to here that purportedly made the agreement with
11 counsel for plaintiff regarding the dismissal.

12 And first of all, let me say, in response to counsel's
13 comment that the purpose of the dismissal was to get the
14 information, no, the purpose of the dismissal was to dismiss a
15 party that never should have been sued, and plaintiff realized,
16 given evolving case law, certainly there was no case against
17 Twilio whatsoever here. That's why Twilio was dismissed. And
18 if the Court reads the email correspondence, that's abundantly
19 clear from the emails going back and forth.

20 The Hazzard Declaration, Your Honor, is on point on the
21 issue of whether there's anything that Twilio has that would be
22 helpful in this case.

23 And first, as plaintiff's counsel acknowledged in the
24 *Sterk v. Path* case, where the same plaintiff's firm in a
25 similar type of lawsuit served a Subpoena on Twilio, Twilio did

1 not produce documents on the basis that they weren't relevant
2 to that case, and the plaintiff didn't -- ended up obtaining no
3 documents.

4 And paragraph 3 of the Hazzard Declaration is on point
5 and explains why Twilio produced no documents in the Northern
6 District of Illinois case and would not be producing anything
7 here.

8 Mr. Hazzard says that during their April 18th call --
9 which is one of the calls where they were -- Twilio was asking
10 to be dismissed from the case, he says: Regarding the first
11 category -- this is when he says in his Declaration he tried to
12 discuss the 10 categories of documents with counsel for
13 plaintiff, but counsel for plaintiff, after the first category
14 discussion, wasn't interested.

15 Mr. Hazzard says, "Regarding the first category, I told
16 Mr. Richman and Mr. Balabanian the information sought in their
17 April 18 email was irrelevant to the issues presented in this
18 case" -- that's the GroupMe case -- "because any equipment that
19 Twilio may utilize simply facilitates a transmission path but
20 plays no part in generating, storing or influencing the
21 telephone numbers called through any application or program
22 that incorporates Twilio's application programming interface.
23 Thus, Twilio acts as an intermediate conduit between the person
24 or entity sending a message and the downstream
25 telecommunications carriers that ultimately deliver the message

1 to the sender's intended recipient."

2 There's nothing Twilio has that's relevant to this case.
3 It's just an inter- -- or relevant to the auto dialer issue.
4 It's an intermediary. And that's not -- its role in the
5 transmission isn't relevant to the auto dialer question, which
6 is, I'm sure, why plaintiffs in the *Sterk v. Path* case never
7 filed a Motion to Compel and sought documents and why they
8 haven't done it here either.

9 **THE COURT:** Okay. All right. All right. There are a
10 couple of competing interests here. If I'm going to decide a
11 summary judgment motion on the auto dialer issue, which would
12 be dispositive of the case, I want as full a record as
13 possible.

14 Your 56(d) showing is inadequate. Nonetheless, given
15 that you received no discovery from Twilio, I would be --
16 notwithstanding the fact that your showing is inadequate, I
17 would be inclined to extend some additional time for you to get
18 the information that is pertinent.

19 I can't tell, from the papers that are before me, whether
20 or not that list of 10 reflects items that are necessary for
21 the opposition of this motion.

22 So what I will require at this time is that you meet and
23 confer --

24 As I understand it, Twilio is now represented by your
25 firm, Mr. Merryman?

1 **MR. MERRYMAN:** Yes, Your Honor.

2 **THE COURT:** Okay. So what I'll require is a meet and
3 confer on that list of 10 items. You may not expand it at this
4 time -- that's what you're going to be held to, and you-all
5 determine what is pertinent to the auto dialer issue. That's
6 the only issue that I'm looking at in this early summary
7 judgment motion.

8 After you've met and conferred, if you cannot resolve the
9 question then you're going to have to file a Motion to
10 Compel --

11 **MR. RICHMAN:** Yes, Your Honor.

12 **THE COURT:** -- and specify exactly what is relevant to
13 the limited issue that's before the Court.

14 With regard to the matters you're seeking from Bandwidth,
15 those all go to class certification. If, indeed, this case
16 survives this motion, we'll take it up later.

17 So I'm limiting it -- your further pursuit of discovery,
18 solely to those items that are listed on that list of 10, and
19 solely with respect to Twilio.

20 You can file a Motion to Compel. I'd like you to
21 complete this all within a week. And you can do -- what I'd
22 prefer is some sort of abbreviated motion. I just want a short
23 motion; no more than 10 pages. And you can file that, after
24 you've met and conferred and gone over these items, within a
25 week of today.

1 You have a week to respond, and then I'll decide, on the
2 papers, no further hearing, which items you get.

3 I'll order them produced within a reasonable period of
4 time, somewhere between two and four weeks, and then you'll
5 have two weeks thereafter to submit your Opposition.

6 So the motion is granted in part, denied in part.

7 Now, with regard to the second consideration, that is,
8 the timing of this motion and class certification, counsel is
9 correct. I wanted to hear the auto dialer question because it
10 is potentially case-dispositive before class certification.

11 So as I understand it, you have filed your Motion for
12 Class Certification.

13 Your Opposition is not due yet.

14 **MR. RICHMAN:** 60 days, I believe, Your Honor.

15 **THE COURT:** 60 days, okay. Well, we'll readjust the
16 schedule to account for this additional discovery.

17 I will still hear the summary judgment motion first
18 before the class cert motion. You-all submit a stipulation as
19 to the filing as soon as we figure out, next week, what items
20 are going to be contested in a discovery motion and which items
21 are not going to be contested; then you can figure out how much
22 time to add on to the opposition -- to the schedule for
23 completing the briefing on the class cert motion.

24 All right?

25 **MR. MERRYMAN:** Yes, Your Honor.

1 **MR. RICHMAN:** Yes, Your Honor. Thank you.

2 **THE COURT:** Okay.

3 **MR. MERRYMAN:** Thank you, Your Honor.

4 **THE COURT:** You're welcome.

5 (Proceedings adjourned.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF CONTRACT REPORTER

I, Kelly Lee Polvi, CSR, RMR, FCRR, certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 4th day of September, 2014.



Kelly Lee Polvi
CA CSR No. 6389
Registered Merit Reporter
Federal Certified Realtime Reporter